Date of Decision: 15th November 1995

CRIMINAL APPEAL NO. 1006 OF 1988

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Shri M.J. Dagli, Advocate, for the Appellant

Shri S.R.Divetia, Addl. Public Prosecutor, for the Respondent

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CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 15th November 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Additional City Sessions Judge of Court No. 15 at Ahmedabad on 3rd November 1988 in Sessions Case No. 199 of 1988 convicting the appellant under sec. 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years is under challenge in this appeal preferred by the original accused.

2. It may be mentioned that the appellant was also found

guilty of the offence punishable under sec. 66(1)(b) of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief).

3. The facts giving rise to this appeal need not be stated in detail. It may be sufficient to note that Police Sub-Inspector Shri P.G. Vaghela attached to the Sherkotda police station in Ahmedabad had prior information regarding possession of some obnoxious article by the present appellant and he therefore searched person of the appellant on 23rd December 1987 in presence of the panchas and what was found from the person of the appellant at that time was what is popularly known as charas to the tune of 305 gms. Thereupon the concerned police officer lodged his complaint. The proceeding ultimately came to be registered as Sessions Case No. 199 of 198 and it culminated into conviction and sentencing of the appellant accused of the offences with which he was charged. The aggrieved accused has thereupon invoked the appellate jurisdiction of this court by means of this appeal.

4. It transpires from the evidence on record that at the time of the search of his person, the appellant accused was given no option whether or not he would like to be searched in presence of a gazetted officer or a magistrate in view of the relevant provisions contained in Sec. 50 read with sec. 42 of the NDPS Act. The relevant provision contained therein is held to be mandatory by the Apex Court in its ruling in the case of Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat reported in 1995 (2) 36(2) GLR 1315. Since no such option was given to the appellant accused at the relevant time, his conviction and sentence cannot be sustained in law in view of the very same binding ruling of the Supreme Court. It may be noted that the appellant accused has also been convicted of the offence punishable under sec. 66(1)(b) of the Prohibition Act. The material on record clearly shows and suggests the involvement of the appellant accused in the crime with which he was charged so far this offence is concerned. In view of the overwhelming evidence on record, Shri Dagli for the appellant could not make much headway in support of his submission that the prosecution has not been able to bring the guilt home to the accused qua the said offence. We are therefore of the opinion that the conviction of the appellant accused of the offence punishable under sec. 66(1)(b) of the Prohibition Act deserves to be sustained.

5. It may be mentioned that in view of sentencing the appellant accused to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years for the offence punishable under sec. 20(b)(ii) of the NDPS Act, no separate sentence was awarded for the offence punishable under sec. 66(1)(b) of the Prohibition Act. Since we are upsetting his conviction under the NDPS Act and since we are maintaining

his conviction under the Prohibition Act, we will have to award sentence for his conviction thereunder. We therefore sentence the appellant accused to rigorous imprisonment for 6 months and fine of Rs. 1000 in default rigorous imprisonment for one month more. We are told that the appellant accused is in jail serving his sentence under the NDPS Act since his first arrest on 23rd December 1987. He need not be subjected to serve any fresh term of sentence awarded by us in this judgment.

6. In the result, this appeal is partly accepted. The judgment and order of conviction and sentence passed by the learned Additional City Sessions Judge of Court No. 15 at Ahmedabad on 3rd November 1988 in Sessions Case No. 199 of 1988 qua the offence punishable under sec. 20(b)(ii) of the NDPS Act is quashed and set aside while the conviction of the appellant accused under sec. 66(1)(b) of the Prohibition Act is maintained. The appellant accused is sentenced to rigorous imprisonment for 6 months and fine of Rs. 1000 in default rigorous imprisonment for one month more for the offence punishable under the Prohibition Act. Since he has undergone imprisonment for more than what has been awarded by us, he need not be required to serve any fresh term of imprisonment and he is ordered to be set at liberty if no longer required in any other case. The order regarding disposal of muddamal passed by the learned trial Judge is maintained.
